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VIA ELECTRONIC FILING
Chairman Ajit Pai
Commissioner Brendan Carr
Commissioner Michael O'Rielly
Commissioner Jessica Rosenworcel
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 05-311
Second Further Notice of Proposed Rulemaking
In the Matter of Implementation of Section 621 (a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992-City of Newton, Massachusetts Reply Comments

Honorable Chairman Pai and Commissioners Carr, O'Rielly and Rosenworcel:

The City of Newton, Massachusetts, acting by and through its Mayor Ruthanne Fuller, as the Issuing Authority of cable franchise agreements ("Newton" or the "City of Newton"), submits these Reply Comments regarding the Commission's Second Further Notice of Proposed Rulemaking ("*Second FNPR*") in the above matter.

SUMMARY

Treatment of Cable-Related Franchise Requirements

The City of Newton respectfully requests that the Commission take a step back from the *Second FNPR*'s legal analysis regarding cable-related in-kind contributions, reconsider its tentative conclusions and treat cable-related in-kind contributions (e.g., franchise agreement requirements) differently than non-cable-related in-kind contributions. Franchise agreement requirements are, as a matter of law, separate and distinct from franchise fees. While franchise fees are intended to cover various cable-related expenses which are not franchise agreement obligations, they were never intended to cover the cost of cable-related franchise agreement obligations. These latter obligations have been recognized as separate and apart from franchise fees under federal cable rate regulation and franchise renewal statutes, as well under Commission orders and regulations.

Limiting franchise fee offsets to LFA requirements unrelated to the provision of cable service would be consistent with the Commission's *First Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101(2007). Exercising its authority in this manner would avoid the havoc that the *Second FNPR* would wreak upon LFAs, PEG Access organizations, members of the public that benefit from PEG Access programming and the cable industry, and hopefully avoid another round of appellate litigation.

In the alternative, if the Commission goes forward based on its current legal analysis, it should scale back the range of cable-related in-kind contributions that count against the franchise fee cap, based upon its proposed definition of cable-related in-kind contributions and numerous comments that suggest exclusions for cable-related in-kind contributions that benefit the public, not the LFA or an entity designated by the LFA.[1]

[1] *See, e.g., Newton Comments* (November 14, 2018).

In addition, the Commission should grandfather existing franchise agreements from the effect of any change in longstanding regulatory practices[2] and defer the application of any regulations for a multi-year ramp up period.[3]

The Commission's Final Regulatory Flexibility Analysis must reflect "a description of the steps the agency has taken to minimize the significant economic impact on small entities…."[4] The Commission has heard from many commenters that PEG Access services will be decimated by its tentative proposal. The impact of such Commission action upon existing franchise agreements and PEG Access operations has been underscored by Newton. The Commission should consider the economic benefits of (1) limiting what it classifies as cable-related in-kind contributions which would

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[2] The Commission has twice recognized the need to take into account the effect of its rulemaking on existing franchise agreements. In its *Report and Order and Further Notice of Proposed Rulemaking,* 22 FCC Rcd 5101 at ¶94 (2007), the Commission found that to the extent that its determinations are relevant to incumbent cable operators, "…we would expect that discrepancies would be addressed in the next franchise renewal negotiation period, as noted in the NPRM *infra,* which tentatively concludes that the findings in this *Order* should apply to cable operators that have existing franchise agreements as they negotiate renewal of those agreements with LFAs." In its *Second Report and Order,* 22 FCC Rcd 19633 (2007) at ¶19, the Commission ruled that "…the facts and circumstances of each situation must be assessed on a case-by-case basis under applicable law to determine whether our statutory interpretation should alter the incumbent's existing franchise agreement." The Commission should exercise its discretion to grandfather existing franchise agreements and/or adopt a ramp-up period that applies to all cable franchise agreements. Newton Comments (November 14, 2018). Further reasons for this approach are provided in these Reply Comments, *infra.*

[3] Newton Comments (November 14, 2018). The number of complex issues created by the proposed treatment of cable-related in-kind contributions supports the need for a ramp-up period to address these issues before new rules take effect.

[4] 5 U.S.C.A. §604(a)(6).

count against the franchise fee cap; (2) basing value upon the lesser of cost and market value; (3) grandfathering existing franchise agreements; and (4) deferring the effectiveness of such new rules for a period of years to enable a ramp up period needed by the Commission itself and affected municipalities, non-profit PEG Access service providers and cable operators.

Mixed Use Networks

Newton supports the Commission's clarifying that this proceeding "does not affect the ability of local authorities to regulate non-cable services under other applicable regulatory regimes." The Second FNPR cannot be intended to exempt cable operators from police power standards that apply to other users of the public ways (electric companies, telephone companies and wireless service providers) through the exercise of police power authority that is separate from video franchising authority. *See*, Newton Comments at 23-26; Verizon Comments at 6, note 12 (citing *Second Report and Order*, ¶11, n.31).

Other Issues

The regulatory treatment of "over the top" video is the subject of a separate Commission proceeding and outside the scope of this rulemaking. The Commission should deny Verizon's request that the Commission decide this issue in this rulemaking.

NCTA's request that current and future franchise agreements be modified to require LFAs to provide audits is also outside the scope of this rulemaking.

NCTA's valuation proposals are premature and lack record support.

REPLY COMMENTS REGARDING FRANCHISE FEES

I. Franchise Fees and Franchise-Related Costs are Separate and Mutually Exclusive

Newton supports the arguments made by other commenters, that as a matter of law, (1) franchise fees and the cost of cable-related franchise requirements are separate; and (2) the cost of cable-related franchise requirements cannot be counted against the five percent (5%) cap on franchise fees.[5]

A. Existing Statutes and Rules Treat the Cost of Franchise-Related Requirements and Franchise Fees as Separate, Mutually Exclusive Components for Ratemaking and Franchise Renewal Purposes

1. Cable Ratemaking Statutes

For cable ratemaking purposes, 47 U.S.C. §543(b)(2)(C)(vi) directs the Commission to take into account, among other factors, amounts required to satisfy franchise requirements to support public, educational and governmental channels or the use of such channels. "The 1992 Cable Act specifically identifies franchise-imposed costs as being relevant to the determination of whether cable rates for basic service are reasonable." *Thirteenth Order on Reconsideration in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 FCC Rcd. 388 (1995) at ¶¶121-122. *See also, Id. at* ¶132,133. 47 U.S.C. §543(b)(4) provides that Commission regulations must include standards to identify costs attributable

[5] *Comments of NATOA, et. als.* (November 14, 2018) at 3-9; *Comments of the City of New York at 2-10; Comments of Anne Arundel County, et. als.* (November 14, 2018) at 4-19; *Comments of Association of Washington Cities, et. als.,* (November 14, 2108) at 5-9.

to satisfying franchise requirements to support public, educational and governmental channels or the use of such channels.

2. The Commission's Cable Rate Regulations

The Commission's cable rate regulations: (1) recognize that franchise-related costs are a legitimate cost component of cable rates; and (2) treat franchise-related costs as entirely separate from cable franchise fees subject to the five percent (5%) franchise fee cap. In its *Thirteenth Order on Reconsideration in the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 11 FCC Rcd. 388 (1995), the Commission clarified that "…for purposes of adjusting rates to reflect increases in franchise requirement costs, operators are entitled to pass through any increases in costs that are specifically required by franchise agreements, provided that the recovery of costs may not encompass costs that the operator would incur in the absence of the franchise requirement." 11 Rcd at 394, ¶15.

Among permitted passthrough costs are " (a) costs due to technical or customer service standards that exceed federal requirements; (b) cost increases attributable to satisfying franchise requirements to support public, educational and governmental access; (c) increases in the costs of providing institutional networks, video services, voice transmissions and data services to or from governmental institutions and educational institutions, including private schools…." *Id.*

These types of costs are recovered through a franchise-related cost charge. Under the Commission's existing rules and practices, their value is *not* offset against the franchise fee cap that applies to wholly separate percentage of revenues-based franchise fees. 47 CFR 76.925 (costs of franchise requirements are recoverable through cable rates; they are *not* franchise fees which count against the separate 5% franchise fee cap). *See also*, 47 C.F.R. §76.922 (f) (enumerating external costs and separately listing franchise fees and "costs of complying with franchise requirements, including costs of providing public, educational and governmental access channels as required by the franchising authority….").

The Commission's cable rate regulations reflect its longstanding distinction between the recovery of cable-related costs required by LFAs through rates and the recovery of franchise fees, which are separate from rate determinations under these regulations. *In the Matter of Comcast of Minnesota, Inc.,* 20 FCC Rcd 20157 (2005), the Commission referred to page 2 of the Form 1240 Instructions. Its rules recognize "…seven categories of external costs…" including franchise-related costs and franchise fees. "You [the cable operator] may adjust your maximum permitted rate for changes in these categories of costs *except for franchise fees, which are not included in your permitted rates but rather are simply added to them."20 FCC Rcd at 20161(original emphasis).* Further, the Commission stated that the Form 1240 Instruction, "…by listing 'franchise-related costs' and 'franchise fees' separately, *makes clear that they are distinct categories*" 20 FCC Rcd at 20162.(emphasis added). *Id.* at ¶¶72-77.

FCC Form 1240 and Form 1240 Instructions further delineate the separation between franchise fees and franchise-related costs and how they are recovered. The franchise-related cost component is covered in Worksheet 7 Instructions for Line 707, which state: "Enter the total monthly franchise-related costs for the period. You should attach a complete list of all costs being claimed on Line 707 and include information on how they were calculated and when they occurred or are projected to occur." The Commission's ratemaking instructions on the treatment of franchise-related costs illustrate that cable operators recover these costs through separate charges to subscribers, not through reductions in franchise fees. Franchise-related costs may be based, in part, upon cable-related in-kind contributions which are itemized at cost per Commission instructions. [6]

3. The Second FNPR Conflicts with Cable Ratemaking Law

A cable operator subject to rate regulation would violate the Commission's annual rate filing requirements for the separation of franchise fees and franchise-related costs if it were to net the cost of cable-related in-kind contributions (franchise-related requirements) against its franchise fee costs (the treatment suggested by the *Second FNPR*) rather than report them separately as part of the basic service rate calculation in accordance with Form 1240 Instructions. As an example of current cable operator practices under the Commission's rate regulations, on October 1, 2018, Comcast made Form 1240 rate filings for a number of Massachusetts communities (MA Dept. of Telecommunications and Cable Docket No. 18-5). In its Town of Greenfield Form 1240 back-up Exhibits VI-A through VI-C, Comcast itemized capital cost obligations as well as the annual cost of I-Net maintenance (8 miles @

[6] *See, Comments of Anne Arundel County, et als* (November 14, 2018) at 22-24. *Initial Comments of the City of Philadelphia, et als* (November 14, 2018) at 12-13. It bears stating here that for cable ratemaking purposes, cable operators are permitted to pass through the *cost* of franchise-related requirements, not *market value.* It also bears stating that franchise-related requirements recognized by the Commission for rate pass through treatment overlap with the *Second FNPR's* tentative conclusion that such in-kind items should count against the franchise fee cap.

$1064.06, or $8512.00). Similarly, in its City of Cambridge Form 1240 back-up Exhibits VI-A through VI-C, Comcast itemized capital payment obligations and the annual cost of VRL Maintenance of $5,898 (18 miles). Offsetting these costs against franchise fees would violate Commission cable ratemaking rules.

The *Second FNPR* ignores these laws and facts.[7] Its requiring cable operators to net these costs against the 5% franchise fee cap would result in double recovery. It also would spawn the need for many proceedings to determine to what extent these costs have been and are being recovered through cable rates and weed these costs out of those rates. This exercise would also be needed where cable rates are not regulated, but cable operators have been recovering these costs, through a franchise-related cost line item or otherwise.

4. Franchise Renewal Laws Reflect the Separate Treatment of the Cost of Cable-Related Franchise Requirements and from Franchise Fees

The *Second FNPR* also ignores statutory provisions which govern cable franchise renewal standards. These statutory provisions provide that a LFA may conduct ascertainment proceedings for the purpose of identifying future cable-related community needs and interests. 47 U.S.C. §546 (a)(1). In assessing whether or not a franchise should be renewed, the LFA must consider, among other criteria, whether "(D) the operator's proposal is reasonable to meet the future cable-related community

[7] "Facts do not cease to exist because they are ignored." Aldous Huxley, Complete Essays 2 (1926-1929). Moreover, it would be arbitrary and capricious and an error of law if the Commission adopted regulations which are inconsistent with its existing regulations.

needs and interests, *taking into account the cost of meeting such needs and interests.*" 47 U.S.C. §546(c)(1)(D) (emphasis added). *Union CATV, Inc. v. City of Sturgis, KY,* 107 F.3d 434 (6th Cir. 1997).

Cable operator interests are safeguarded under §47 U.S.C. §§546 (c)(1) and 546(c)(2) with rights to administrative hearings, presentation of evidence, requests for production of documents and the questioning of witnesses. The formal statutory renewal provisions act as a guardrail against any consideration of non-cable related demands by a LFA as well as a safeguard against cable-related requirements which are unreasonably costly.

This entire statutory process would be rendered mere surplusage if the cost of cable-related franchise requirements were simply counted against the franchise fee cap.

5. The Second FNPR is Contrary to the Separate Treatment of Franchise Fees and Cable-Related In-Kind Contributions Under Existing Law

The *Second FNPR* would overturn years of cable rate and franchise regulation which are based on federal statutes such as those discussed above. The *Second FNPR* improperly commingles these cost of cable-related franchise requirements and franchise fees based upon a percentage of revenues.

Cable franchise agreements, such as those submitted by Newton[8], have recognized that cable-related in-kind contributions are separate cost component of cable rates. They are *not* evasions of the franchise fee cap. They are *not* offsets against the franchise fee. They are recognized as a proper cost of providing cable service under statute and the Commission's cable rate regulations. The above

[8] *Newton Comments* (November 18, 2018) at 5, note 2.

practices, described by many municipal and PEG access commenters, have been followed by cable operators, LFAs and the Commission itself for many years.[9] These practices are grounded in clear legal distinctions between franchise fees and the cost of cable-related franchise requirements. The *Second FNPR* makes no attempt to square its tentative conclusions with federal laws regarding cable rate regulation and franchise renewals, including its own regulations and orders.

C. Cable-Related and Non-Cable- Related In-Kind Contributions are Distinguishable and Should Continue to be Treated Differently

Treating cable-related franchise requirements in the same manner that they have been treated for decades by the Commission, the cable industry and municipalities, is not legally inconsistent with the Commission's requirement that the value of non-cable-related in-kind contributions be offset against the franchise fee cap.[10] Nor does such separate treatment render the franchise fee cap meaningless. The franchise fee cap affords protection against LFA demands for in-kind contributions which are not cable-related.

As explained above, there is a legal distinction between cable-related and non-cable related in-kind contributions. The former are recognized by Congress and the Commission as part of the cost of providing cable service (e.g., as cable-related franchise obligations). These costs are based on the

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[9] *Newton Comments* (November 14, 2018) at 7-11 (discussing long-term nature of franchise agreements and years of cable operator and municipal franchising practices).

[10] Report and Order and Further Notice of Proposed Rulemaking *In the Matter of Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992* (MB 05-311 released March 5, 2007) at ¶¶105-108.

cable-related needs and interests of the community as determined through the cable franchising renewal process. They are passed through to cable subscribers as franchise-related costs under federal statutory law and the Commission's own rate regulations.

In contrast, non-cable-related in-kind contributions are not recognized as franchise- related costs under federal cable rate and franchise renewal statutes or the Commission's ratemaking regulations.

D. The Second FNPR is not Supported by Federal Court Decisions

The Sixth Circuit's decision in *Montgomery County, MD v. FCC*, 863 F.3d 485(6th Cir. 2017) does not support the Commission's proposed actions set forth in the Second FNPR. First, the Court stated that its earlier opinion in *Alliance for Community Media v. FCC,* 529 F.3d 763 (6th Cir. 2008) "...nowhere analyzed or approved the idea that every cost or expense that a cable operator bears in complying with the terms of its franchise is a 'franchise fee' under [47 U.S.C.] §542(g)(1)." 863 F.3d at 490. Second, the Court found that while the term "franchise fee" may include noncash exactions, it did not find that the term "franchise fee" includes cable-related non-cash exactions. *Id.* It further found that "...the FCC has offered no explanation as to why the statutory text allows it to treat 'in-kind' cable-related exactions as franchise fees." *Id.* at 491. The Court directed the Commission to "...determine and explain anew whether, and to what extent, cable-related exactions are 'franchise fees' under the Communications Act." *Id.* at 491-492.

Alliance for Community Media et als v. Federal Communications Commission, 529 F.3d 763(6th Cir. 2008) illustrates how the Second FNPR's proposed treatment of cable-related in-kind contributions is contrary to the Commission's original reasoning. The Court described five rules adopted by the Commission in *First Report and Order and Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101(2007), one of which was that 'any requests made by LFAs that are unrelated to the provision of cable services by a new competitive entrant are subject to the statutory [five] percent franchise fee cap.' 529 F.3d at 771. While the Commission thus adopted a guard rail against LFA demands upon new entrants which were unrelated to the provision of cable service, the Commission took a different approach to safeguard the interests of new entrants against unreasonable demands for cable-related PEG carriage obligations. In this instance, the Commission approved a " '*pro rata* cost sharing approach' in which a 'new entrant agrees to share *pro rata* costs with the incumbent operator' as *'per se* reasonable.'" 529 F.3d at 771-772. The Commission expressly recognized that the cost of cable-related PEG access channel capacity was a franchise requirement properly allocated between a competitive entrant and an incumbent cable operator-and unlike requests unrelated to the provision of cable service, not subject to the five percent franchise fee cap.

Further, the Court in the *Alliance* case cited a Commission statement that the "central test for determining whether an expense is a [PEG access] capital cost [and excluded from the five percent franchise fee cap] is whether it is 'incurred in or associated with the construction of PEG access facilities.' This definition could encompass the cost of purchasing equipment, as long as that equipment related to the construction of actual facilities." 529 F.3d at 784. The Court cited legislative history in support of the Commission's then held position that PEG channel capacity includes PEG access facilities and equipment, which "...may include vans, studios, cameras, or other equipment relating to the use of public, educational, or government channel capacity" (citing H.R. Rep. No. 98-934 at 45). 529 F.3d at 784-785.

The Commission, as well as the Court, recognized that there are distinctions between franchise fees, and the costs of cable-related franchise requirements that are not subject to the franchise fee cap. The Commission's inexplicable departure from this well-reasoned position, upheld by the Court, is legally incorrect, arbitrary and capricious. *See, Order on Reconsideration* at ¶13 (Commission misstatements cited in the *Montgomery County* decision). *Second FNPR* (at ¶¶16-24). The Commission now has an opportunity to correct its error.

II. The Negative Impacts of the Second FNPR, as Proposed, are Substantial

The *Second FNPR*'s tentative conclusions would have substantial negative impacts upon providers of PEG Access services and LFAs. This conclusion is supported by (1) the sheer number of franchise-related costs that the *Second FNPR* tentatively classifies as cable-related in-kind contributions, (2) their counting against the 5% franchise fee cap; and (2) NCTA's suggested market valuation proposals.

It is very difficult for LFAs to quantify these impacts, given uncertainty, for example, as to (1) what cable-related franchise requirements would be offset against the franchise fee cap; (2) acceptable methods of valuation; (3) proof of valuation; (4) whether new rules would apply to existing franchise agreements; (5) whether the Commission will defer the effective date to allow for a reasonable ramp up period; and (6) the costs of resolving disputes arising out any prescriptive Commission regulations.

The impacts also will vary based upon individual LFA cable-related franchise requirements. Newton's Comments explained disruptions for LFAs with multiple renewal licenses and how unexpected franchise fee revenue losses would impact the long-term obligations of PEG Access service providers (e.g., leases, debt service).

The complexity of an impact assessment is illustrated by a customer service office.[11] Issues include: (1) reviewable cost support for includable costs; (2) whether such costs would be allocated among all communities served at the customer service office, where some communities did not require a customer service office under their franchise agreements, or allocated just to those communities with this franchise requirement; and (3) the allocation or direct assignment of customer service office costs based upon its utilization for non-cable services, like Internet, VoIP and wireless (costs of space, labor costs, etc.). The *Second FNPR* provides no guidance to stakeholders, leaving them to address potentially significant franchise fee revenue losses that the Commission has yet to consider.

The cost of cable-related franchise agreement requirements will vary from LFA to LFA and from one state vs another. The Commission thus far has not been provided by cable operators with specific cost or market value information needed to begin the process for assessing the impacts of the

[11] As Newton has maintained, this type of cost does not benefit a LFA or an entity designated by a LFA and should not count against the franchise fee cap based on the Commission's tentative definition of cable-related in-kind contributions. In addition, one might conclude that so long as a customer service office is used for non-cable service purposes, its entire cost would have been incurred by a cable operator absent a franchise agreement requirement and should not count against the franchise fee cap for that independent reason.

Second FNPR. This is another reason why the ramp up period suggested by Newton is reasonable and necessary for the implementation of the tentative conclusions of the *Second FNPR.*

REPLY COMMENTS REGARDING MIXED-USE NETWORKS

Verizon requests that the Commission "…confirm that non-cable services…over a mixed- use network are not subject to LFA regulation under a cable services franchise" and "…that a cable franchise agreement cannot be the basis for LFA regulation of non-cable services for both incumbent and new entrants." (Verizon Comments at 6,9). Verizon notes that a declaration to this effect "does not affect the ability of local authorities to regulate non-cable services under other applicable regulatory regimes." (Verizon Comments at 6, note 12, citing *Second Report and Order*, ¶11, n.31).

Newton supports the Commission's clarifying that this proceeding "does not affect the ability of local authorities to regulate non-cable services under other applicable regulatory regimes." The Second FNPR cannot be intended to exempt cable operators from police power standards that apply to other users of the public ways (electric companies, telephone companies and wireless service providers) through the exercise of police power authority that is separate from video franchising authority. *See*, Newton Comments at 23-26.

OTHER ISSUES

A. Over the Top Video is Outside the Scope of this Proceeding

Verizon has asked the Commission "…to confirm that over-the-top video distributors are immune from legacy cable regulations because they are not 'cable operators' and do not provide a 'cable service' over a 'cable system." (Verizon Comments at 9). This issue is being addressed by the Commission in a separate proceeding[12] and is outside the scope of this rulemaking.

B. Making LFAs Subject to Audits is Outside the Scope of this Proceeding

NCTA has urged the Commission to impose auditing requirements upon LFAs to demonstrate their use of franchise fees. This issue is outside the scope of this proceeding. The Commission should not rewrite existing franchise agreements or dictate the terms of new franchise agreements.[13]

C. NCTA's Valuation Proposals are Premature

The Commission should not act hastily on the NCTA's valuation proposals. If the Commission adopts cable-related in-kind contribution offsets against franchise fees (which it should not), it needs to proceed deliberately. The ramp-up period recommended by Newton would afford the Commission and stakeholders an opportunity to consider the broad range of issues associated cable-related in-kind contributions: what should be valued, valuation methods, proof of costs and market value, cost recovery methodology, cost allocation issues and the cost recovery period (not to mention the time required to scrub existing cable rates to remove whatever value is embedded in them for cable-related in-kind franchise requirements). NCTA's Comments do not consider the myriad of issues that the Commission must address.

[12] *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services,* Notice of Proposed Rulemaking, 29 FCC Rcd 15,995 (2014).

[13] In Massachusetts, this type of provision has been a matter for franchise renewal negotiations.

The use of a ramp up period would enable the Commission, or affected parties by agreement, to develop more uniform standards. Otherwise, cable operators, LFAs, PEG Access organizations and the courts will be handed only a vague prescription that will lead to balkanized, likely inconsistent outcomes and ineffective Commission regulations.

D. The Purposes of the Second FNPR are Not Met by the Commission's Proposal

The ostensible goals of the *Second FNPR* are to "…promote competition by fostering parity between incumbents and new entrants and helping to ensure that local franchising requirements do not discourage cable operators from investing in new facilities and services." *Second FNPR* at ¶1. There is no lack of parity if incumbents and new entrants alike pay franchise fees and meet the costs of their cable-related franchise agreement requirements. Parity also exists where, as in Newton, cable rates are not regulated and cable operators pass through to subscribers both franchise fees and the cost of cable-related franchise requirements.

In both cases, cable operators are insulated against the cost of non-cable related in-kind demands of a LFA under an existing Commission order. In both cases, they are afforded protections against unreasonably costly cable-related franchise obligations under federal franchise renewal laws. Federal law also affords cable operators an opportunity to seek franchise agreement modifications. Adoption of the *Second FPRM*'s cable-related in-kind contribution proposal does nothing to advance the parity goals of this proceeding.

Investment decisions by cable operators are not driven solely, if at all, by local cable franchising requirements. Verizon obtained a cable franchise in Newton at a time when the City was already being served by RCN and Comcast. Verizon already had a Title II network in place. In all three cases, the cable operators' investment decisions reflect not only their business cases for cable, but also their ability to generate revenues from non-cable services, such as Internet access and VoIP, which are not regulated by Newton. Some cable operators have used cable networks to branch into home security services. Cable operators have expressed an interest in providing over the top video services (e.g., Verizon's Comments in this proceeding) or in offering video services that make use of wireless and wireline facilities (e.g., Verizon Wireless's rollout of 5G services, use of existing Verizon wireline network for backhaul). Cable operators have been able to leverage their cable networks by expanding their utilization.[14] Cable network investments-including upgrades- have not been deterred by the pass through of the cost of cable-related in-kind contributions to cable subscribers, separate from franchise fees.

In this changing environment, more than a decade after the Commission began its consideration parity between new cable entrants and incumbents and the effect of cable franchising practices upon cable system investment, the Commission's concerns regarding the treatment of new entrants (telephone companies) and incumbents are anachronistic. They provide no public interest justification for the Commission's erroneous franchise fee proposal. The only results of the Commission's franchise fee proposal are the erosion or outright elimination of PEG Access services due to a loss of revenues under cable franchise agreements and financial harm to municipalities if they divert taxpayer revenues to pay for PEG Access facilities and operations.

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[14] Xfinity has brought both Netflix and Amazon Prime onto its cable system.

CONCLUSION

The City thanks the Commission for the opportunity to submit Reply Comments and hopes that the Commission will take its recommendations into account.

Respectfully submitted,

City of Newton, Massachusetts

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